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Supreme Court of the United States

OCTOBER TERM, 1946

No. 1310

BUSH TERMINAL RAILROAD COMPANY,
Petitioner,

against

BUSH TERMINAL BUILDINGS COMPANY

BRIEF OF BUSH TERMINAL BUILDINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In this action the State courts of New York have decreed specific performance of a written contract entered into by the petitioner for certiorari. For more than thirty years the petitioner lived up to the obligations of that contract and never questioned its validity. But for reasons of private gain to itself, as pointed out in the opinion of the Supreme Court of New York, the railroad petitioner commenced in 1942 consistent violations of the agreement and, in the ensuing several years of litigation over it, has persistently sought to avoid further observance of its agreement. Its points of view regarding the validity of the contract were presented unsuccessfully by it five times in this litigation to the Supreme Court of the State of New York, twice to the Appellate Division of the Supreme Court of New York, and once before the Court of Appeals of the State of New York. When leave to further appeal to the Court of Appeals was again lately sought the Appellate Division, and the Court of Appeals itself, deemed the case for petitioner so lacking in merit that even permission further to appeal was denied. Now, after that lengthy and unsuccessful judicial effort to escape its contract for the

remainder of its term, the railroad is petitioning this Court for writ of certiorari.

In its petition for certiorari the petitioner does not say that the case itself is one of broad general interest or that there were presented in it any novel undecided questions of law of widespread importance. Furthermore there is no contention that any decision of a question of law by the New York State Courts in the present litigation was in conflict with a decision of the same or substantially the same question of law by the appellate court of any other state or of the United States. It is not even said that there are frequent contractual situations of the sort here involved that would now or in the future be affected by the outcome of this litigation.

All that is suggested as a basis for the petition for certiorari is that the New York courts, in requiring enforcement of the particular railroad contract involved, committed *error* in their refusal to *apply* certain well-established and not disputed rules of law which the petitioner had urged *should* apply but which the courts of New York State and the respondent have said do *not* apply.

In other words certiorari is sought only to correct a *claim of error* in the non-application of certain familiar rules of law which are not themselves in question. Consequently were this court to grant certiorari in this case its final decision on the merits would not establish any *new* rules of law or resolve any *conflicts* of decisions as between inferior courts, nor would there be settled any presently unsettled matter of widespread general importance of contract interpretation and enforcement.

Certiorari is not a substitute for the old writ or error from this court to state courts. Much more is now required to be shown in a petition for certiorari than a mere claim that the state courts erroneously did not apply previous decisions of this and other courts with respect to well understood and undisputed principles which, however, the state courts did not consider to be involved.

I.

The stated reasons upon which the petitioner relies for issuance of the writ.

It is said in formal terms that the writ should be allowed for the following two reasons:

1. That the intermediate appellate court of New York State failed to apply to the particular facts the principle that judicial action may not be taken as to a matter in litigation concerning which there are deemed by a defendant to be present administrative questions not yet determined by the appropriate administrative agencies and that in any event judicial action should here have been stayed pending administrative inquiry.

2. Although put forth as an entirely different reason for the writ the second one stated is in reality but a variation of the first. It is that because in fact the New York Courts did exercise judicial authority their action in doing so was (it is claimed) in conflict with the "paramount if not exclusive" authority of the Interstate Commerce Commission.

But the Interstate Commerce Commission did not share the view that it possesses either exclusive or even paramount administrative authority over the subject matter of this particular contract. Three times during the course of this judicial litigation the railroad petitioner for certiorari applied to that Commission for the institution of an investigation by it into the lawfulness, administratively, of the involved agreement. On each of those three occasions the Commission declined even though it had before it in the railroad petitions a full recital of all the factual and argumentative claims.

Furthermore this particular railroad contract, in paragraph 5 (printed record page 751) contains the following express language:

> "(5) *By both parties hereto,* that the terms and provisions of this contract are binding upon the re-

> spective successors and assigns of the parties hereto, provided that nothing herein contained shall be contrary to the regulations of the Interstate Commerce Commission, the Public Service Commission or any law to regulate traffic operations, as the same may from time to time become effective."

Taking note of that language the Supreme Court of the State of New York called to particular attention that in requiring specific enforcement of the contract——

> "Nothing in the determination of the court in this case is intended to contravene any such regulations or law or to assume the jurisdiction or authority of those bodies or to anticipate their future action".

Hence, in ordering specific performance, the State courts have not barred any right of an administrative agency to inquire whether, in its practical operation, the contract would violate any regulatory law.

ARGUMENT

What is said above may be enough but the following is added more by way of detail.

In 1911 the Bush Terminal Railroad Company (the petitioner) entered into a written agreement with the Bush Terminal Buildings Company. The two corporations were, at that time, under a common ownership and control, Mr. Irving T. Bush having been the founder of the enterprise well known in the shipping world under the popular name "Bush Terminal". It was after that common control ended that the attempted breach of the contract occurred and this litigation thereupon had to be commenced.

The contract was entered a number of years ago at the time when the Bush company was undertaking to raise new capital for the construction of ten large industrial loft buildings near the waterfront of Brooklyn, New York, to be numbered 1-10. A bond issue of about twelve millions of

dollars was to be floated. To facilitate their sale the involved contract was here entered into. Reciting in terms that the Buildings Company required the contract in order to create a better market for the sale of its bonds then issued and to be issued the written agreement provided that throughout the term of the contract the Bush Terminal Railroad Company would "reasonably provide and will properly operate adequate cars and motive power" for freight transportation between the Buildings 1-10 and the piers, warehouses, and other properties of the Bush Terminal Company.

Separately the petitioner leased from the Buildings Company the ground floors of the buildings and made of them its public freight station for the receipt and delivery of property. *That was the only place for the receipt and delivery of less than carload freight shipments on the line of railroad of the petitioner until 1945.* The existence of that public freight station was amply described in the railroad tariffs on file with the Interstate Commerce Commission and Public Service Commission of the State of New York. That a bona fide public freight station was so created at that place (known as the "36th Street Station") has been found and determined by the Interstate Commerce Commission (*Re Application of Bush Terminal Railroad Company* 257 I. C. C. 375) by the Public Service Commission of the State of New York (*United Cigar-Whelan Store et al.* v. *Bush Terminal Company,* Case No. 11655, decided May 25, 1945) and by the Supreme Court of the State of New York in this litigation on a full record before it.

For more than thirty years the petitioner lived up to its contract and likewise received its benefits. Freight car services to and from these buildings were continuously maintained until the breach complained of.

In the upper stories of these Buildings 1-10 more than 100 different shippers have occupied space where they have conducted their separate businesses calling for freight to be received and shipped by them by railroad. Being located in the same buildings as where the petitioner railroad has

its public freight station those shippers derive an economic benefit from the fact that their freight comes to them at that station or leaves them at that station in railroad cars which the Bush Terminal Railroad Company pulls with its electric locomotives over its own tracks in terminal service between these buildings and points of interchange between it and the trunk line railroads on both sides of New York Harbor.

The petitioner has not applied to the Public Service Commission of the State of New York for authority under the laws of that state to abandon its public freight station at these buildings 1-10 and it may not abandon that station without such authority because, barring any very extensive track alterations, Congress has chosen to leave to the states rather than to the Interstate Commerce Commission control over the location of public freight stations (*R. R. Com. of Cal.* v. *So. Pac.*, 264 U. S. 231; *I. C. C.* v. *U. S. ex rel. City of Los Angeles*, 280 U. S. 52; *Corp. Com. Okla.* v. *A. T. & S. F. Ry. Co.*, 101 I. C. C. 647). Instead, without seeking the exercise of state administrative authority over station abandonments, the plan of the petitioner has been to use another and recently established (1945) one of its stations (48th Street Station in Brooklyn) as the place where its railroad common carrier obligation of receiving and delivering property of the shippers in Buildings 1-10 would begin or end. Between that new 48th Street Station and these Buildings 1-10 the petitioner has wished to institute what is popularly called "store door collection and delivery" service by motor vehicles just as that kind of accessorial service is offered by it to shippers and consignees throughout Brooklyn remote from its rails. This intended discontinuance of common carrier railroad less than carload freight service, in freight cars, to and from the public freight station in Buildings 1-10, and the intent to offer instead mere store door collection and delivery service by motor trucks to and from the different station at 48th Street, would be nothing more than to offer an accessorial supplemental "terminal service" wholly voluntary in na-

ture, not required by law as a part of railroad common carrier duty, and something which would be capable of withdrawal at will. (*New York Dock Co.* v. *P. R. R. Co.*, 62 Fed. 2d, 1010; *Merchant Truckmen's Bureau* v. *U. S.*, 16 F. Supp. 999; *American Trucking Asso.* v. *U. S.* 17 F. Supp. 655; *Re Pickup and Delivery*, 281 I. C. C. 441).

For solid carload shipments the continued existence of the public freight station at Buildings 1-10 seemingly is planned.

The courts of New York, properly, have directed that petitioner fulfill its contract as to less than carload shipments which has yet a number of years to run until the bonds mature. That contract looks to the performance of railroad common carrier services to and from Buildings 1-10. There is no indicated purpose on the part of petitioner to "abandon its line of railroad" to and from the station at those buildings. Instead, as found by the Supreme Court of New York, the petitioner actually planned, as to less than carload shipments, to continue to retain the agreed "divisions of through rates" between it and the trunk line railroads to and from the station in Buildings 1-10 and at the same time obtain from those same trunk line railroads additional compensation for the new store door collection and delivery services to and from Buildings 1-10 which it has wished to institute. That would redound to its greater profit, the courts below finding that no economy of operation was shown by the record to be in prospect.

The courts of New York find nothing in the contract sued upon rendering it presently unforceable. They do not look upon the case as calling for any invasion of administrative authority by them. While paragraph 14 of Section 1 of the Interstate Commerce Act speaks of the administrative authority of the Commission to establish reasonable "rules, regulations, and practices" with respect to "car services" by railroad carriers, that paragraph is only one of a number of related paragraphs all of which have to do with the assurance of fair and non-discriminatory rules for the distribution of available freight cars as between various dif-

ferently located shippers *in times of car shortages.* (*Assigned Car cases* 274 U. S. 564.) Paragraphs 10, 11, 12, 13 and 15 of Section 1 of the Act are the cognate provisions of which paragraph 14 is but a part, and all relate to "car shortage" rules of distribution or some other question of discriminatory use of cars. The mere failure or refusal of a railroad to furnish cars at a given station does not call for invocation of administrative authority. (*Corpus Juris Secundum,* Vol. 13, p. 69 et seq.)

When a railroad contractually agrees to furnish freight car services to and from a given location at which its public freight station exists such a contract is not of itself void. So to use freight cars is wholly normal and usual. No "special service" either in fact or requiring tariff publication exists in such use of railroad cars and locomotives for the receipt and delivery of freight at a public station.

True enough the many other shippers scattered throughout Brooklyn, including some in other buildings reached by rails of the Bush Terminal Railroad Company are, as to their less than carload freight shipments, required to do one or the other of two things: either they must at their own primary expense get their freight to and from a railroad station or, at their own election, accept the railroad "store door collection and delivery" plan. Were it to be thought by any of those shippers (none of whom have filed complaint with administrative bodies) that they are economically disadvantaged and unlawfully discriminated against as compared with the shippers who are located in Buildings 1-10 and who therefore receive freight car services the obvious answer is the one given by the courts of New York. The mere economic advantage of shipper location in or near to a railroad public freight station is not an unlawful discrimination (*U. S.* v. *B. & O. R. R. Co.,* 231 U. S. 274; *Merchants Warehouse Co.* v. *U. S.,* 283 U. S. 501) when such location gives rise to the opportunity of utilizing most conveniently the customary railroad facilities which the servicing of a station entails.

II.

The New York Courts have disavowed the intent to invade the administrative province of either the Federal or State Regulative Bodies.

It did not appear to the courts of New York State that present enforcement of this contract would violate any provision of regulatory law by invading administrative authority. On the contrary: the Supreme Court of New York disavowed any such intent and called to attention that by the very terms of the contract (paragraph 5 of it) the following was a part of the agreement:

> "(5) *By both parties hereto,* that the terms and provisions of this contract are binding upon the respective successors and assigns of the parties hereto, provided that nothing herein contained shall be contrary to the regulations of the Interstate Commerce Commission, the Public Service Commission or any law to regulate traffic operations, as the same may from time to time become effective."

The decision of this court in *General American Tank Car Corp.* v. *Eldorado Terminal Company,* 308 U. S. 422, was at all times before them in this litigation and taken into consideration by the courts of New York State. That was not an action in equity for the enforcement of a contract. It was an action at law for the recovery of damages for the claimed past breach of a contract. By way of defense to that action at law the railroad asserted the contract there sued upon called upon it to pay a sum of money greater than would be "reasonable" and hence, in result, such payment would create a discriminatory rebate. This Court observed that it was the peculiar function of the Interstate Commerce Commission, as an expert administrative body, to inquire whether allowances by railroads to shippers for the use of tank cars were "reasonable" in amounts. Hence,

it was held, the action for damages should have been judicially stayed long enough to afford an opportunity for the Interstate Commerce Commission to pass upon the reasonableness of the amount of the agreed allowance.

Here, in the present action, however, no such question of "reasonableness" is presented. Instead the railroad petitioner has merely taken the position that for it to use railroad freight cars when receiving and delivering less than carload shipments *at one of its public freight stations* there inherently results a "discriminatory special service" as compared with its store door collection and delivery service by motor vehicles throughout Brooklyn when receiving and delivering less than carload shipments at the places of business of shippers and consignees who are *not* located in a public freight station.

Rightly the courts of New York State concluded that no substantial question of discrimination or other administrative question was presented by that character of defense. In any event the holding was that nothing in the decision of this case was intended to "anticipate the future action" of any administrative body which might conclude hereafter to consider the situation.

For no clear reason the petitioner has all along supposed that its position in this litigation derives support from a prior decision of the Interstate Commerce Commission in *"Re Bush Terminal R. R. Co.,"* 257 I. C. C. 375. But there entirely different buildings were involved. No question of contract enforcement as to railroad operations to and from them was presented. That case arose upon an application for "extension of line of railroad" under Section 1(18) of the Interstate Commerce Act. Certain protesting shippers urged that should the application be granted it should be conditioned upon a requirement that railroad freight car services to and from those other buildings be reinstituted. The Commission concluded that the public convenience and necessity did not so require the imposition of that "con-

dition". There was no holding that the voluntary or contractual use of railroad cars at those other buildings would have been unlawful in any respect had a contract with regard to common carrier railroad service to them been entered.

Conclusion

Under the circumstances it is respectfully submitted that no occasion for the issuance of a writ of certiorari here exists.

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